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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 1358

PACIFIC OIL COMPANY,
Petitioner,

vs.

WALTER J. HICKEL, Secretary of the Interior of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

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Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit which affirmed a judgment of the United States District Court for the District of Colorado.

OPINIONS BELOW

The decision of the Assistant Solicitor, Land Appeals, acting for the Secretary of the Interior, of May 16, 1963, printed in Appendix B, pages 6 to 19, is unreported. The

Findings and Opinion of the United States District Court for the District of Colorado dated September 12, 1967, printed in Appendix C, pages 20 to 45, is reported in 278 F.Supp. 203. The opinion of the Court of Appeals for the Tenth Circuit, printed in Appendix D, pages 46 to 55, is reported in 406 F.2d 452.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was filed and entered on February 4, 1969 (Transcript of Record 4, 5, App. D., pp. 46, 55).* This Court has jurisidiction under section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED

Whether the refusal of the Secretary of the Interior to grant petitioner's application for patents on oil shale claims or even to determine on the merits petitioner's right to such patents is such arbitrary and capricious action as to require review and reversal by this Court where (1) the Secretary, both before and after the applications for patents were filed, had granted patents on 22 other oil shale claims with the identical location history, and (2) such refusal was based upon a prior default decision of the Commissioner of the General Land Office, which decision was rendered despite applicant's

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*The Record on Appeal from the district court is incorporated by reference on page 2 of the Transcript of Record certified by the Clerk of the Court of Appeals. Record references hereinafter are to the pages of the Record on Appeal and will be designated "R....."

request for adjudication on the merits as shown by the record and despite the fact that said Commissioner's refusal to adjudicate the merits was inconsistent with his action in similar cases.

STATUTES INVOLVED

Petitioner's right to judicial review of the Secretary's decision is provided by sections 702, 703, 704 and 706 of Title 5, United States Code (80 Stat. 392-393). Petitioner's right to patents on its mining claims arises out of the mining and public land laws of the United States, and in particular sections 29 and 35 of Title 30, United States Code (R.S. 2325, 2329 and 2331 (as amended 26 Stat. 1097)). These sections are set out in Appendix A.

STATEMENT OF THE CASE

Petitioner, as the owner of 38 unpatented mining claims, brought this action against the Secretary of the Interior to set aside his adverse ruling on patent applications petitioner had filed for the claims, to obtain a declaration of petitioner's right to patents and to require the Secretary to issue patents on each of the claims. The jurisdiction of the district court was based upon sections 1331, 1361 and 2201 of Title 28, United States Code, and sections 701-706, inclusive, of Title 5, United States Code (formerly 5 U.S.C. § 1009). The district court entered judgment for the Secretary of the Interior, and that judgment was affirmed by the United States Court of Appeals for the Tenth Circuit.

The patent applications were filed in 1952 and 1953 for two groups of oil shale placer claims located in 1918 (Pl. Exhs. 13-A, 14-A and 18-A; R. 136, 400, 401, 410). Regardless of the fact that the Land Office Manager had approved some of the claims for patent and had recommended adverse proceedings as to the others (Pl. Exhs. 35-A and 36-A; R. 136, 445, 446), the Secretary ultimately rejected all the applications on the ground that they had been declared void by a decision of his predecessor in 1933 (Pl. Exh. 69-A; App. B; R. 136, 502).

This 1933 decision (Pl. Exh. 10-A; R. 136, 349) was a default order ending proceedings seeking patents on the same claims, applications for which were filed in 1926 and 1927 by Wheeler Shale Co., petitioner's predecessor in interest in the claims (Pl. Exhs. 1-A, 2-A, 3-A, 4-A; R. 136, 328, 329, 330, 331). A Notice of Contest was issued in 1929, asserting that the claims were not valid, principally on the alleged ground that two of the purported locators were dummies and one person had a greater interest in the claims than the law allowed (Pl. Exh. 5-A; R. 136, 332). The default was ordered because the applicant did not "appear" at the contest hearing, although it responded to the Notice by an "Answer of Contestee," denying the allegations and by a statement reciting its lack of funds to continue the contest and requesting that the Commissioner of the General Land Office "decide this contest on the record as it stands (Pl. Exhs. 6-A and 7-A; R. 136, 333, 337). The Commissioner held that financial inability was not good cause for failure to appear and defend against the contest further and, therefore, that the truth of the Contest allegations was deemed to

be admitted, and he declared the claims to be null and void (Pl. Exh. 10-A; R. 136, 349).[1]

In addition to the 38 claims involved in this case, there were 23 other claims which were located under the same arrangements among the same locators and as to most of which the same charges had been made in similar contests. Nevertheless, patents have been issued on 22 of the other 23 claims. As early as 1923 two of the claims were patented after the chief of the Denver field office held that the charges were untrue (Pl. Exhs. 5-F, 6-F; R. 139, 568, 571). In 1931, while the contest was pending with respect to the claims in the case at bar, two more of the claims were patented with no questions raised as to the bona fides of the locators (Pl. Exhs. 3-C, 4-C; R. 137, 525, 527). In 1951, patents issued on 17 more of these claims, even though the claims had previously been held null and void in 1930 on the same charges as involved in the case at bar (Pl. Exhs. 1-G, 4-G; R. 142, 573, 578). Finally, in 1960, a patent was issued on another claim which was located under the same arrangements between the locators (Pl. Exh. 3-E; R. 137, 553).[2]

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[1]After the Commissioner's action, the contestees executed a quitclaim deed "in consideration" of a refund of their purchase money deposit. The Court of Appeals correctly held that there was "no significance to the execution of this deed as a conveyance," and that "as to mining claims such a transaction and deed were considered to be effective as to the 'entry' only and to have no effect on the mining location" (App. D., p. 51).

[2]The history of all of these patents is discussed fully in the district court's Findings and Opinion (App. C., pp. 21-23, 30-36).

REASONS FOR GRANTING THE WRIT

THE ACTION OF THE SECRETARY OF THE INTERIOR IN REJECTING THE PATENT APPLICATIONS WAS ARBITRARY AND CAPRICIOUS AND THE COURT OF APPEALS ERRED IN HOLDING THAT SUCH ACTION COULD NOT BE JUDICIALLY REVIEWED.

The Court of Appeals conceded that

> "* * * the record does demonstrate a series of apparent inconsistent acts with reference to claims in a status similar to those of appellants, and a series of changes in policy with reference to oil shale claims which are somewhat bewildering."

Nevertheless the court held:

> "The results may have been wrong, the exercise of discretion may have been wrong, and the decisions here concerned may have been inconsistent with those in other cases, but this is not for this court to decide" (App. D., p. 54).

This holding is erroneous. It decides as a matter of law that no remedy exists for the Secretary's arbitrary action in rejecting the patent applications in the case at bar, whereas between 1923 and 1960 he had issued patents to four other applicants on 22 other mining claims located under exactly the same arrangements among the same locators. Such a ruling ignores the law that "[t]he reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 706, App. A, p. 2) and, we submit, such a ruling so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its powers of supervision.

There is no dispute as to the facts. The Secretary rejected the applications only because of the 1933 "default" order that was itself arbitrary and an abuse of discretion. This default decision was made because the applicant did not physically "appear" at the Contest hearing although the applicant had timely filed a written pleading denying the allegations of the Contest and requesting a determination of its application on the record because it was without funds to defend the Contest further—a fact taken as undisputed by the trial court (App. C, p. 40).[3] This, as the Court of Appeals conceded (App. D., p. 52), was contrary to the Department's treatment of other applicants where financial inability to defend *was* considered "good cause" under Department rules for failure to defend further and determination was made on the record, and no default was entered (see, e.g., the "Mountain Boy" decision, App. E, p. 58).

This inconsistent action in similar cases cannot be passed off as merely an exercise of discretion by the Department. The different treatment accorded various claim owners is so inconsistent, both substantively and procedurally, as to amount to arbitrary conduct and an abuse of discretion by the Department and also a violation of the petitioner's right of due process under the standards set by this Court.

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[3] *Gabbs Exploration Company v. Udall* (D.C. Cir. 1963) 315 F.2d 37, certiorari denied (1963) 375 U.S. 822, relied upon by the district court, is inapposite. The default in that case was entered because the patent applicant failed to answer, object or otherwise defend in any way against the Contest charges.

Unequal and inconsistent application of laws and departmental regulations is a matter for judicial remedy and this Court long ago so held. In *Yick Wo v. Hopkins* (1886) 118 U.S. 356, this Court reversed a conviction under an ordinance conferring upon municipal authorities the power to give or withhold consent to permit a person to establish a business where it was admitted that the ordinance had been applied to some persons and not to others under the same circumstances. The Court there said (pp. 369-370):

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

Similarly, in *Hurtado v. California* (1884) 110 U.S. 516, this Court said (pp. 535-536):

> "Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case * * *. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."

And in *Leeper v. Texas* (1891) 139 U.S. 462, 468, this Court said:

> "* * * due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

Inconsistent application of the law by the Interstate Commerce Commission was condemned by this Court in *Sec'y of Agriculture v. United States* (1954) 347 U.S. 645, 653, where the Commission was reversed and the case remanded for further proceedings because "the Commission has not adequately explained its departure from prior norms." And in *City of Lawrence, Massachusetts v. C.A.B.* (1 Cir. 1965) 343 F.2d 583, the court held (p. 588):

> "Apart from these internal inconsistencies, the Board's decision, without explanation, reverses an earlier case involving essentially the same questions * * *; departs from the reasoning and holding in other regional airport cases * * *; and is inconsistent with other aspects of this same proceeding * * *. Such action is arbitrary and capricious, and must be reversed."

It is important to the administration of justice that this Court exercise its supervisory power to maintain consistency of decision in the departments and agencies of the Government dealing with matters of great importance.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendices Follow)

Appendix A

TITLE 5, UNITED STATES CODE

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application

for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

TITLE 30, UNITED STATES CODE

§ 29. Patents; procedure to obtain

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under sections 21-24, 26-30, 33-48, 50-52, 71-76 of this title, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of said sections, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States supervisor of surveys, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published

nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States supervisor of surveys that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits. R.S. § 2325; Jan. 22, 1880, c. 9, § 1, 21 Stat. 61; Mar. 3, 1925, c. 462, 43 Stat. 1144, 1145.

§ 35. Placer claims conforming entry to legal subdivisions and surveys; limitation of claims

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead purposes. R.S. §§ 2329, 2331; Mar. 3, 1891, c. 561, § 4, 26 Stat. 1097.

Appendix B

Langdon H. Larwill et al.

A-28697 Decided May 16 1963

Mining Claims: Determination of Validity — Mining Claims: Patent Mining claims may be declared null and void if the claimants fail to appeal from or protest a default decision after notice of hearing on charges contesting the validity of the claims; and where the claimants acquiesce for twenty years in the decision declaring the claims null and void, the decision is conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration.

United States
Department of the Interior
Office of the Secretary
Washington 25, D. C.

A-28697

Langdon H. Larwill and Horace Slusser as trustees for the stockholders of Wheeler Shale Corporation	: Colorado 04383, 04384, 07395; Contest No. 126.
	: Applications for mineral patents rejected; mining claims declared null and void; mineral contest dismissed.
	: Affirmed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Langdon H. Larwill and Horace Slusser, as trustees for the stockholders of the Wheeler Shale Corporation, a corporation dissolved by expiration of the term authorized by its charter,[1] have appealed to the Secretary of the Interior from a decision of September 23, 1960 by the Acting Director of the Bureau of Land Management which affirmed decisions by the manager and the acting manager of the Colorado land office rejecting mineral patent applications for 38 oil shale placers covering an area of 5955.37 acres in Garfield County, Colorado.[2] The Acting Director's decision also affirmed a manager's decision closing contest No. 126 initiated on March 5, 1956, against the Victory claims included in the applications here involved. The patent applications were rejected and the contest dismissed on the ground that the claims, which were located in 1918, had been declared null and void by the Commissioner of the General Land Office (predecessor of the Director of the Bureau of Land Man-

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[1]The application states that the appellants are the sole surviving members of the board of directors of the corporation, and, as such, are authorized under Colorado law to hold the real and personal property of the corporation as trustees for the stockholders.

[2]The applications are:

Colorado 04383, filed February 12, 1952, for 22 claims in T. 5 S., R. 97 W., and T. 5 S., R. 98 W., 6th P. M. The claims are Bitumen Nos. 1, 4, 5, 7, 11, 14, and 15 and Victory Nos. 1 through 5 and 8 through 17, inclusive.

Colorado 04384, filed February 12, 1952, for 16 claims, three of which were later withdrawn. The claims applied for, Victory Nos. 18 through 29, inclusive, and Bitumen Nos. 2, 3, 6 and 8, are in sections 5, 6, 7, 8, 18, and 19, T. 5 S., R. 97 W., 6th P. M. On November 18, 1952, this application was withdrawn as to Victory Nos. 26, 27, and 28.

Colorado 07395, filed on October 28, 1953. It is a separate application for Victory Nos. 26, 27, and 28.

agement) by decision of January 12, 1933, and that the claims were, therefore, nonexistent.[3]

In January 1926 and April 1927, the Wheeler Shale Company, a Colorado corporation, predecessor in interest of the appellants (see note 1), filed mineral patent applications, Denver 037742, 037743, 037744, 037745, 037756, and 038545, covering Victory claims Nos. 1 through 29 and Bitumen claims Nos. 1 through 17. Each of the 38 claims applied for in the instant proceeding was applied for in 1926 or 1927 under one of the above-identified applications. By letter of January 4, 1929, the Commissioner directed the register to notify Wheeler Shale that a number of charges had been filed by a representative of the Department against the claims. In part here material, the charges against the claims were that they were located for the use and benefit of George B. Sibbald and that F. N. Juhan and Elizabeth Juhan were dummy locators. An answer denying the charges was filed on behalf of Wheeler Shale. A hearing was set (Contest No. 11946) for September 26, 1932, continued to October 6 before a designated officer, with final hearing set for November 7, 1932. Shortly before the hearing date, Wheeler Shale Company filed a petition with the register for the consideration of the matter upon the record as

[3]On March 5, 1956, the Bitumen claims here applied for were approved by the manager for clearlisting for patents. This was done under direction of the Bureau, and, on the same date, contest No. 126 was brought against the Victory claims. The contest was dismissed by a manager's decision of April 21, 1959, because the claims had been declared null and void earlier. As the claims were nonexistent, the contest proceeding was unnecessary, having been initiated only because the earlier proceeding which terminated with the Commissioner's decision of January 12, 1933, declaring the claims null and void was, inadvertently, overlooked.

it then stood. The company stated that the expense of continuing the contest would be very great; that the company did not have sufficient funds with which to meet the expense of the prospective contest; that Edward Wheeler purchased the claims for a valuable consideration from George Sibbald in 1923; that Wheeler had never theretofore had any connection with any of the claims; that later Wheeler organized contestee company and turned the claims over to it in consideration for a part of its capital stock and

> "this contestee asks as to the 38 claims still owned by it that the Commissioner of the General Land Office shall decide this contest on the record as it stands; and if such decision be adverse to this contestee, that this contestee be allowed repayment of the purchase price of said 38 claims."

On October 6 a motion for default judgment was made on behalf of the Government, which asserted, *inter alia,* that Wheeler Shale Company consented to judgment by default in the event of an adverse ruling upon its petition for consideration of the matter on the record as it then stood. The Commissioner's decision of January 12, 1933, stated:

> "The fact that the Wheeler Shale Company has conveyed certain of the claims since the issuance of final certificates, and is financially unable to defend the entries in question against the charges preferred against them is no warrant for dismissing the adverse proceedings instituted against the entries and the failure to appear on the date set for the hearing and submit testimony controverting the charges preferred against the entries, is taken as an admission of the truth of the charges and mineral entries

037742, 037743, 037744, 037745, 037756, 038545 are hereby canceled and the Victory Nos. 1 to 29, inclusive, and Bitumen Nos. 1 to 17, inclusive, oil shale placer claims are declared to be null and void."

The Commissioner's decision of January 12, 1933, indicated that action would be taken later on the application for repayment. Thereafter, in connection with repayment of the purchase price, these appellants, as vice-president and secretary, respectively, of Wheeler Shale, signed a quit-claim deed conveying to the United States all of Wheeler Shale's "right, title, and interest in and to" the Bitumen and Victory claims.

Wheeler Shale did not appeal from or protest the Commissioner's decision. Notations on departmental tract books show that the mineral entries were canceled and the Bitumen and Victory claims here applied for were declared null and void by the decision of January 12, 1933. Thereafter, no action was taken with respect to the mining claims until 1952 and 1953 when the applications involved in this appeal were filed. An oil and gas lease (Denver 055623) issued effective September 1, 1949, included a part of the land covered by these patent applications and, pending action by the Bureau on these applications, a number of additional oil and gas leases have been issued on the land here under consideration.

Before considering further the issues raised on this appeal the Department's action in a related case will be briefly summarized because of its bearing on the determination of this case.

In 1925, Rea Eaton filed patent applications for a number of oil shale placers identified as French claims Nos.

1 to 11 and 26 to 31 inclusive. The French placers are, like the claims here involved, situated in Garfield County, Colorado. The Government contested the claims charging, in part here relevant, that the locators

> were not equally interested to the extent of 20 acres to each locator in each of said claims, but that P. C. Thurmond used the names of his colocators, with or without their permission for the purpose of enabling him to include in each location a greater area than he was entitled by law to locate; that
>
> the locations of said claims were not made for the use and benefit of the locators but were made for the use and benefit of George Sibbald pursuant to an agreement made with P. C. Thurmond prior to the date the said claims were located; and that
>
> F. N. Juhan and Elizabeth Juhan were dummy locators.

Sections 2330 and 2331 of the Revised Statutes (30 U. S. C. 1958 ed., secs. 35, 36) provide that no placer mining location made after May 10, 1872, shall include more than 20 acres for each individual claimant and that no location of a placer claim, made after July 9, 1870, shall exceed 160 acres for any one person or association of persons. These provisions have been construed to mean that from and after May 10, 1872, no location can exceed 20 acres for each individual participating therein (*cf.* Circular 430, 44 L. D. 247, 290 and 43 CFR 185.24). Thus, the location in one person's name for the actual benefit of another, whereby the latter may obtain an interest in excess of 20 acres is prohibited. The French claims were located by P. C. Thurmond and seven other persons. On March 30, 1918, Thurmond entered into an agreement with one George Sibbald under which Sibbald,

according to the Government charges, was to obtain an interest in the French claims and others including the Bitumen and Victory claims involved in the present appeal exceeding that permitted him by law. The contract, which appears in entries in the abstracts of title submitted with patent applications of Wheeler Shale in 1926 and those of the present appellants, is as follows:

"P. C. Thurmond, First Party *AGREEMENT*

To Dated March 30, 1918.

George Sibbald, Second party.

"Recites that P. C. Thurmond agrees to locate and survey for George Sibbald the following oil shale claims, situated in Garfield County, Colorado, provided that said Thurmond is able to get valid locations and filings of said land made before other parties accomplish this, THE BITUMEN GROUP; the G. W. S. group and the Victory Group and French Group as shown on a blue print furnished the said Sibbald. It is further agreed by and between the parties of the first and second parts said George Sibbald is to pay P. C. Thurmond the sum of $600. for each and every section so located and surveyed; further that the said party of the second part is to pay first party in advance $450. per month, on the 10th day of each and every month to help defray the expense of locating and surveying said claims and the balance of said money upon the sale of said claims. It is further agreed that the party of the second part reserves the right to sell one or more sections of this land at his option and at the time of the sale the second party agrees to pay to first party $100. for each section sold, at the time of signing the contract of sale; $200. on each section sold in 30 days after date of sale; $200 on each

section sold in 60 days after date of sale; and the balance of the $100 on sections sold at the expiration of 90 days after sale of same.

"It is further agreed that the money advanced for expenses shall be divided by the total number of sections upon which same is expended and that the result shall be considered to be the sum expended upon one section and that in holding back this money in settlement when land is sold ⅙ of the amount expended on the section or sections sold shall be deducted from the first payment, ⅓ from each of the next two payments and ⅙ from the last payment, the consideration of the above contract is $100. to be applied on first monthly payment of $450. due the party of the first part on April 10, 1918.

"Filed for the record June 15, 1918 at 9:00 o'clock A.M. and recorded in book 103 at page 413 thereof."

A departmental decision of June 8, 1931, *United States v. Rae* [sic] *L. Eaton,* A.14971, affirmed a decision of the Commissioner of the General Land Office declaring these French claims null and void. The Department stated that the agreement of March 30, 1918, on its face purports to be a contract whereby Thurmond for himself, and not for others, was to locate for and sell to Sibbald certain French and other claims. A decision of March 22, 1932, by the Secretary reaffirmed the decision of June 8, 1931, in the *Eaton* case and denied a petition for reconsideration which alleged, *inter alia,* prejudice on the part of the Chief of the Denver Field Division. In a memorandum accompanying the decision of March 22, 1932, the evidence and entire proceeding against the French claims were exhaustively reconsidered before concluding, again, that the claims were null and void. Years later,

in 1951, the French claims involved in the proceedings just set forth, were patented. The patenting of these claims was the result of a mistake, the failure to ascertain that the claims had been declared null and void approximately 20 years before the patent issued. Thereafter, the error was discovered and litigation was instituted (*United States v. Eaton Shale Co. et al.*, Civil No. 5758, United States District Court, Colorado District) which ended with a compromise settlement, the United States receiving approximately $460,000.

Thus, the correctness of the charges which were the equivalent of a charge of fraudulent location of the French claims by reason of the Thurmond-Sibbald agreement of March 30, 1918, has been decided and reaffirmed after careful consideration by the Department. To the extent that the other claims named in the agreement are indistinguishable from the French claims with regard to those factors which are material to establishing fraudulent location of a mining claim, and the Victory claims here involved are so indistinguishable, the claims are null and void for the reasons given in the *Eaton* decisions, *supra*. Accordingly, as it is plain that the patenting of the French claims in 1951 was the result of an error, the patenting of those claims is no warrant for granting the appellants' applications for patent here under consideration, thus repeating the error made with regard to the French claims.

Most of the matters raised on this appeal have been considered in recent cases involving circumstances very similar to those of this case. The Department has held that where mining claims have been declared null and

void pursuant to regular proceedings and the mining claimants acquiesce in such decisions for many years, the decisions nullifying the claims are conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration. (*Gabbs Exploration Company,* 67 I.D. 160 (1960); *Gabbs Exploration Company,* A-28213 (May 24, 1960) and A-28213 (Supp.) (July 11, 1960); *Garfield County Exploration Company,* A-28351 (August 30, 1960).) (The last-cited case rejected an application for patent on Bitumen No. 18 which is one of the same group of claims as the Bitumen claims here applied for.) There is no basis for differentiating the patent applications here involved from those considered in the *Gabbs* and *Garfield* cases with respect to the mining claimants' long acquiescence in default decisions nullifying the claims and the absence of a persuasive legal or equitable basis warranting reconsideration of those decisions.

The decisions in the *Gabbs* case were recently affirmed by the United States Court of Appeals for the District of Columbia Circuit (No. 16,803, February 14, 1963). Sustaining the Department's refusal to reopen proceedings in that case, the court said:

> "The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions [footnote omitted], has also recognized that there must be some time limit on such reconsideration. As Assistant Attorney General Van Devanter said in *Aspen Consolidated Mining Co. v. Williams,* 27 L.D. 1, at 11:
>
> 'The parties remain the same and the one complaining of the former decision has taken timely

and decisive action to have the alleged wrong corrected.'

"Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. Here twenty-seven years have elapsed between the alleged wrong (1929) and plaintiff's attempt to have it corrected (1956). There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him to reopen the case even though he retains jurisdiction over the land in dispute. * * *" (Slip copy, pp. 7-8.)

The appellants contend that the Commissioner's decision of January 12, 1933, did not become final when no appeal was taken because of the provision in paragraph 10 of the applicable rule that in cases finally closed upon default of the claimant, if application to reopen any case is filed with the register and receiver, they will forthwith forward same with recommendations to the General Land Office.[4] The appellants argue that, under this provision,

[4]The pertinent departmental regulation (Circular 460, 44 L.D. 572 (1916)) provided:

"10. If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or fails to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government sub-

the Commissioner's decision did not become final when no appeal was taken, but was subject to being reopened by subsequent action of the applicant. When, in 1952, the appellants filed the applications for patent here under consideration, they contend, in effect, that they applied for a reconsideration of the Commissioner's decision within the requirement of paragraph 10. The contention is of no avail. An application for reconsideration must be filed within a reasonable time. Although the determination of what constitutes a reasonable time may vary with the circumstances of each case, the ordinary 30-day period within which an appeal is to be filed may well be regarded as the base period against which a reasonable time for requesting reconsideration is to be tested. In any event, a request for reconsideration which is filed 20 years after the decision in question was issued is not filed within a reasonable time.

In discussing the procedure which led up to the Commissioner's decision of 1933, the appellants argue that a decision on the merits should have been entered in 1933 and that the default decision was improper in view of the fact that the contestee had filed an answer denying the charges and other material in the contest proceeding and requested a decision on the merits (see footnote 4). After acquiescing in the Commissioner's decision for almost 20 years, the appellants' objection to the form of the decision is made too late.

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mitting evidence in support thereof, and the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office and notify the parties by registered mail of the action taken. In cases finally closed upon default of claimant, if application to reopen any case is filed with the register and receiver, they will forthwith forward same with recommendations to the General Land Office."

The appellants' further contention that at most the Commissioner was authorized only to cancel the mineral entries and reject the patent applications in the 1933 default decision and that he had no authority to nullify the claims is erroneous for the reasons discussed in the *Gabbs Exploration Company* cases, *supra*. In addition, since the charges against the claims here involved, to the effect that the claims were fraudulently located, if proved, would necessitate a decision that the claims were null and void, no possessory right under the mining laws in land covered by such claims could survive. Neither could any possessory right in the claims survive a default decision terminating a contest charging that claims were fraudulently located. Since the failure of the contestee to attend the hearing ordered was taken as an admission by the contestee of the truth of the contest charges, the default decision necessarily concluded that the claims were null and void.

Finally, the appellants argue emphatically that Wheeler Shale was, in effect, unfairly treated in the proceedings which terminated with the 1933 default decisions because of the prejudice against oil shale claims of a former departmental official in the Denver Field Division. It has already been mentioned that the Department reconsidered at length the charges against the French claims because of a similar allegation of prejudice on the part of the Chief of the Denver Field Division. Thereafter, on March 22, 1932, the Secretary denied the petition for exercise of supervisory authority and reaffirmed the decision that the French claims had been fraudulently located (*United States v. Rea L. Eaton,* A.14971). Nothing in this record suggests that if Wheeler Shale had applied for recon-

sideration within a reasonable time the outcome would have differed from that in the *Eaton* case, *supra*.

After a careful review of the records in this case, there appears to be no basis for modifying the Acting Director's decision. Accordingly, it is concluded that the patent applications here involved were properly rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

/s/ Ernest F. Hom
Ernest F. Hom
Assistant Solicitor
Land Appeals

Appendix C

In the United States District Court
For the District of Colorado

Civil Action No. 9406

Pacific Oil Company,
Plaintiff,

vs.

Stewart L. Udall,
Secretary of the Interior
of the United States
of America,
Defendants.

Messrs. Peter H. Holme, Jr., Esq. and A. Edgar Benton, Esq., Holme, Roberts & Owen, Attorneys at Law, 1700 Broadway, Denver, Colorado; Mr. Lawrence M. Henry, United States Attorney for the District of Colorado, by David I. Shedroff, Assistant United States Attorney and by Thomas L. McKevitt, Attorney, Lands and Natural Resources Division, Justice Department, Washington, D. C.

FINDINGS AND OPINION

Doyle, Judge.

The above action was tried to the court and although testimony was taken, this was for the most part clarifying with respect to the administrative action taken by

the Department of the Interior. Essentially it is a review of these administrative determinations and dispositions. Plaintiff is the alleged successor in interest and owner of allegedly valid oil shale placer mining claims located in Garfield County, Colorado.[1] This is one of a series of so-called oil shale cases. The plaintiff seeks to set aside a series of adverse administrative decisions concerning the claims in question and also seeks a declaration of their validity and an order directing the secretary to issue patents or a remand to the Department of the Interior for further proceedings.

Jurisdiction exists. It arises on the basis of 28 U.S.C. §§ 1331, 1361, the Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act, 5 U.S.C. § 1009 and the Mining and Public Land Laws of the United States, 30 U.S.C. §§ 22-38 inclusive. Briefs have been filed and the case now stands submitted.

Like the other oil shale cases, this one involves an extensive review of administrative history and action, most of which took place during the 1920s and 1930s. In order to understand the cases it is invariably necessary to set out the facts at some length.

History of Victory 1 through 5, 8 through 29 and Bitumen 1 through 8, 11, 14 and 15

It all began on March 4, 1918 when P. C. Thurmond, together with others located the Bitumen Nos. 1 through 8, 11, 14, 15, 18, 24 through 26. On April 5, 1918, he located Victory Nos. 1 through 5, 8 through 29 and

[1]Specifically, the Victory Numbers 1 through 5, 8 through 29, and Bitumen Numbers 1 through 8, 11, 14 and 15.

French Nos. 1 through 12, 25 through 31. For our purposes at least it can be said that the locators of all of these claims were the same.[2] The controversy here revolves around a certain agreement which was entered into on March 30, 1918, after some of the claims were located but before others were located. This agreement was between Thurmond and one Dr. George Sibbald, under which Thurmond agreed to locate and survey the Bitumen, Victory, French and "G.W.S." oil shale claims for Sibbald in return for considerations provided in the agreement.[3] As noted, the Bitumen Group had been pre-

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[2]Bitumen and Victory Groups: P. C. Thurmond, Coral Thurmond, F. N. Juhan, Elizabeth Juhan, Joe T. Juhan, Joe Gregory, James E. Ford, M. M. Ford. French Group: P. C. Thurmond, Coral Thurmond, F. N. Juhan, Elizabeth Juhan, James E. Ford, M. M. Ford, W. S. Parkison, C. W. Taylor.

[3]Thurmond-Sibbald Agreement:

"P. C. Thurmond, First Party
to
George Sibbald, Second Party

AGREEMENT
dated March 30, 1918

"Recites that P. C. Thurmond agrees to locate and survey for George Sibbald the following oil shale claims, situated Garfield County, Colorado, provided that said Thurmond is able to get valid locations and filings of said land made before other parties accomplish this, THE BITUMEN GROUP; the G.W.S. Group and THE VICTORY GROUP and FRENCH GROUP as shown on a blue print furnished the said Sibbald. It is further agreed by and between the parties of the first and second parts said George Sibbald is to pay P. C. Thurmond the sum of $600. for each and every section so located and surveyed; further that the said party of the second part is to pay first party in advance $450. per month, on the 10th day of each and every month to help defray the expense of locating and surveying said claims and the balance of said money upon the sale of said claims. It is further agreed that the party of the second part reserves the right to sell one or more sections of this land at his option and at the time of the sale the second party agrees to pay to the first party $100. for each section sold, at the time of signing the contract of sale; $200. on each section sold in 30 days after date of sale; $200. on each section sold in 60 days

viously located as of the date of the signing of the agreement. During the next five years as a result of conveyances from co-locators to Thurmond and from Thurmond to Sibbald and also conveyances from Sibbald to Edward B. Wheeler, the Wheeler Shale Company, the plaintiff's predecessor in interest, became the record owner of the Bitumen Claims Nos. 1 through 17 and Victory Claims Nos. 1 through 29.[4] Thereafter, during the years 1926 and 1927, Wheeler Shale Company filed mineral patent applications covering the Bitumen and Victory groups, including all of the claims involved in the present action.[5]

The Department of the Interior, on February 13, 1929, started Contest No. 11946 against all of these applications asserting that the locators were not equally interested to the extent of 20 acres per locator; that the claims were essentially located for the use and benefit of George B. Sibbald and alleging further that locators F. N. Juhan

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after date of sale; and the balance of the $100. on sections sold at the expiration of 90 days after sale of same.

"It is further agreed that the money advanced for expenses shall be divided by the total number of sections upon which same is expended and that the result shall be considered to be the sum expended upon one section and that in holding back this money in settlement when land is sold 1/6 of the amount expended on the section or sections sold shall be deducted from the first payment, 1/3 from each of the next two payments and 1/6 from the last payment, the consideration of the above contract is $100. to be applied on first monthly payment of $450. due the party of the first part on April 10, 1918.

"Filed for the record June 15, 1918 at 9:00 o'clock a.m. and recorded in book 103 at page 413 thereof."

[4]Plaintiff's Exhibit 1A12.

[5]Denver Mineral Patent Applications, 037742, 037743, 037744, 037745, 037756 and 038545, covering Victory Claims Nos. 1 through 29 and Bitumen Claims Nos. 1 through 17.

and Elizabeth Juhan were dummy locators.[6] Wheeler Shale Company filed its answer in which it denied the charges and a hearing was then set for October 6, 1932.

The failure of Wheeler to appear at the hearing and the filing by it of the petition asking that the matter be determined on the record as it then stood is one of the embattled areas of the case. In this petition, Wheeler asserted that it did not have sufficient funds with which to continue to prosecute the contest and thus, that it could not appear at the hearing. It requested that the matter be determined on the record. The company also requested that its "purchase price", that is, funds advanced by it in connection with the patent applications be repaid to it if the decision should be adverse. The "hearing" occurred on January 12, 1933. Wheeler representatives failed to appear and the Commissioner of the General Land Office issued a decision noting the non-appearance and declaring the claims null and void. In fact, the proceeding was treated as a default and a formal hearing was not held. On that occasion the Commissioner said:

> "The fact that the Wheeler Shale Company has conveyed certain of the claims since the issuance of final certificates, and is financially unable to defend the entries in question against the charges preferred against them is no warrant for dismissing the ad-

[6]Sections 2330 and 2331 of the Revised Statutes, 30 U.S.C. §§ 35, 36, provide that no placer mining location made after May 10, 1872, shall include more than 20 acres for each individual claimant and that no location of a placer claim made after July 9, 1870, shall exceed 160 acres for any one person or association of persons. These provisions have been construed to mean that from and after May 10, 1872, no location can exceed 20 acres for each individual participating therein. 43 C.F.R. §3416.1.

verse proceedings instituted against the entries and the failure to appear on the date set for the hearing and submit testimony controverting the charges preferred against the entries, is taken as an admission of the truth of the charges and mineral entries 037742, 037743, 037744, 037745, 037756, 038545 are hereby canceled and the Victory Nos. 1 to 29, inclusive, and Bitumen Nos. 1 to 17, inclusive, oil shale placer claims are declared to be null and void."

Following this, Wheeler executed to the United States a quit claim deed which purported to convey all of its right, title and interest in and to the Bitumen and Victory claims. The consideration was refund of the "purchase price". Moreover, no appeal was taken by Wheeler to the Secretary of the Interior from the Commissioner's decision.

It was not until 1952 and 1953 that any further step was taken. In those years Langdon H. Larwill and Horace G. Slusser, surviving trustees of the then dissolved Wheeler Shale Company, filed patent applications on the Bitumen and Victory claims which are here in issue.[7] These applications failed to disclose on their faces that the claims had been previously declared null and void. Plaintiffs have offered evidence to establish that this information was furnished to personnel of the Department of the Interior even though the applications did not contain it, and that they were advised to file new applications rather than petitions for reopening and reconsideration. In any event, on March 5, 1956, the Manager of the Colorado Land Office approved the Bitumen claims

[7]See Note 1, supra. These applications were designated Colorado Mineral Patent Applications 04383, 04384 and 07395.

for patent[7a] and initiated Contest No. 126 against the Victory claims.[7b] This contest challenged the Victory claims on essentially the same grounds as had been asserted in Contest No. 11946 *supra,* which included the dummy locator charge. Patents were not thereafter issued because before the contest proceedings were held, the manager summarily rejected the applications, canceled the mineral entry issued for Bitumen Nos. 2, 3, 6 and 8, and closed the proceedings in Contest No. 126. The basis for this action was that the Department had learned that the claims had been declared null and void in 1933. These decisions were as indicated by the Manager and were dated April 21, April 22 and May 1, 1959. This time an appeal was taken to the Director of the Bureau of Land Management, asserting (a) that the Commissioner's 1933 decision was ineffectual because it was based on Wheeler's default rather than on the merits; (b) that the Commissioner had no jurisdiction to declare the claims null and void since Contest No. 11946 was directed only toward the rejection of the patent application and cancellation of the mineral entry and (c) that the Commissioner's 1933 decision did not become final when Wheeler failed to appear and was subject to later reopening and reconsideration in the Department and should be now corrected, revised, or reversed and that the entries should be clearlisted for patent and Contest No. 126 reinstated that the issues therein could be properly determined.

The Director affirmed the Manager by decision dated September 23, 1960. He noted that the 1933 proceedings

[7a]Plaintiff's Exhibit 1A35.

[7b]Plaintiff's Exhibits 1A36, 1A37.

were "entirely regular and in accordance with the Rules of Practice then in effect."[8] He also noted that the rules specifically provided that failure to appear at a contest hearing "without showing good cause therefor" would be taken as an admission of the charges (citing 43 CFR, 1940 ed. §222.9) that the original application had requested and received a refund and that there was no basis, equitable or legal, for reopening the procedure after a period of some twenty-six years acquiescence in the Commissioner's decision. An appeal was taken to the Secretary of the Interior who, through the Assistant Solicitor for Land Appeals, affirmed the Director's decision. This was on May 16, 1963 and provided in part as follows:

> Most of the matters raised on this appeal have been considered in recent cases involving circumstances very similar to those of this case. The Department has held that where mining claims have been declared null and void pursuant to regular proceedings and the mining claimants acquiesce in such decisions for many years, the decisions nullifying the claims are conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration. (Gabbs Exploration Company, 67 I.D. 160 (1960); Gabbs Exploration Company, A-28213 (May 24, 1960) and A-28213 (Supp.) (July 11, 1960); Garfield County Exploration Company, A-28351 (August 30, 1960).) (The last-cited case rejected an application for patent on Bitumen No. 18 which is one of the same group of claims as the Bitumen claims here applied for.) There is no basis for differentiating the patent applications here involved from those considered in the Gabbs and Garfield cases with respect

[8]Citing 43 CFR, 1940 ed. Part 222; Circ. 460, 44 L.D. 572.

to the mining claimants' long acquiescence in default decisions nullifying the claims and the absence of a persuasive legal or equitable basis warranting reconsideration of those decisions.

* * *

The appellants argue that . . . the Commissioner's decision did not become final when no appeal was taken, but was subject to being reopened by subsequent action of the applicant. When, in 1952, the appellants filed the applications for patent here under consideration, they contend, in effect, that they applied for a reconsideration of the Commissioner's decision within the requirement of paragraph 10 [paragraph 10 of Department Circular 460, 44 L.D. 592 (1916)]. The contention is of no avail. An application for reconsideration must be filed within a reasonable time. * * * [A] request for reconsideration which is filed 20 years after the decision in question was issued is not filed within a reasonable time.

In discussing the procedure which led up to the Commissioner's decision of 1933, the appellants argue that a decision on the merits should have been entered in 1933 and that the default decision was improper in view of the fact that the contestee had filed an answer denying the charges and other material in the contest proceeding and requested a decision on the merits. . . . After acquiescing in the Commissioner's decision for almost 20 years, the appellants' objection to the form of the decision is made too late.

The appellants' further contention that at most the Commissioner was authorized only to cancel the mineral entries and reject the patent applications in the 1933 default decision and that he had no authority

to nullify the claims is erroneous for the reasons discussed in the *Gabbs Exploration Company* cases, *supra*. In addition, since the charges against the claims here involved, to the effect that the claims were fraudulently located, if proved, would necessitate a decision that the claims were null and void, no possessory right under the mining laws in land covered by such claims could survive. Neither could any possessory right in the claims survive a default decision terminating a contest charging that claims were fraudulently located. Since the failure of the contestee to attend the hearing ordered was taken as an admission by the contestee of the truth of the contest charges, the default decision necessarily concluded that the claims were null and void.

It is noteworthy that the plaintiff here had to do with the 1952 and 1953 patent applications. These were filed pursuant to an October 12, 1951 agreement between the Wheeler trustees, applicants and the plaintiff.[8a] This agreement provided that the plaintiff acquired the right to purchase the Bitumen and Victory claims and agreed to advance funds to the trustees to meet the cost of patenting. Plaintiff alleges here that as of January 1, 1963, it had paid out approximately $90,000.00 for this purpose. On that date a supplemental agreement[8b] was entered into under which the trustees would convey the claims to plaintiff in advance of the issuance of the patents. It is alleged that on or about January 24, 1963, plaintiff paid an additional $63,000.00 and a deed to the claims was deposited in escrow and was to be delivered on plaintiff's request and on the payment of an addi-

[8a]Plaintiff's Exhibit 1K.
[8b]Plaintiff's Exhibit 1L.

tional $1,000.00. This final payment was made and the deed[8c] was delivered to plaintiff by the escrow agent on September 7, 1965. On September 24, 1965, plaintiff commenced the present action.

The facts as related aboye are not disputed, but plaintiff maintains that they fail to tell the entire story and that other parallel history must also be examined and compared in order to fully realize the inconsistency of the Department's decisions. Plaintiff calls attention to the history of other oil shale claims which were also located by Thurmond in 1918. These are the Bitumen Nos. 18 and 24 through 26, and the French Nos. 1 through 12 and 25 through 31. Patent applications for these claims were filed by their owners during the same period in which Wheeler Shale Company applied for patents on the Bitumen Nos. 1 through 17 and Victory Nos. 1 through 29 noted above. Some of these applications were approved and patents were actually issued. Others, including those which relate to the claims involved in this action, were denied. Plaintiff contends that when you consider the total picture, the actions of the Department in indiscriminately granting and denying patents for claims located at the same time by pretty much the same locators are entirely inconsistent, contradictory, contrary to law and constitute uneven administration of justice. This alleged administrative caprice together with the plaintiff's contention that their present claims have never been considered on their merits, but were the victims of arbitrary procedure in 1933, forms the basis for this present action.

[8c]Plaintiff's Exhibit 1M.

The French Nos. 12 and 25 Claims

To gain insight regarding the plaintiff's contention, it is necessary to examine the action by the Department in respect to the French Nos. 12 and 25 Claims. An application for patent on these was filed by one Rea L. Eaton on July 19, 1922. An examination was made by a field investigator of the General Land Office and he recommended that adverse proceedings be brought against the claims. The investigator made essentially the same assertion which was later made in Contest No. 11946 against the Wheeler applications: this was that the locations under the Thurmond-Sibbald agreement were solely for the benefit of Thurmond and Sibbald and that the other "co-locators" did not share equally in the subsequent sale of the claims by Thurmond to Sibbald and were therefore used as dummies.[9] This recommendation was rejected by the Chief of the Denver Field Office who recommended approval of the patent application on the ground that further information had shown that the Thurmond-Sibbald agreement was never carried out and that the other co-locators had benefited from their interests in the claims.

Thereafter, the claims were clearlisted by the Acting Commissioner in his memorandum dated October 26, 1922. This stated, in part, "the record does not show that the agreement was ever carried into effect, or * * * that it was * * * intended to be one by which either Sibbald or Thurmond would obtain claims in violation

[9]Plaintiff's Exhibit 2f, letter from Oral J. Berry, Mineral Examiner, General Land Office, to the Commissioner of the General Land Office, dated August 1, 1922.

of the placer mining laws."[10] Following this approval, patents were issued to Rea L. Eaton on April 27, 1923, for the French Nos. 12 and 25.

The French Nos. 1 through 11, 26 through 31 and Bitumen Nos. 25 and 26 Claims

On August 26, 1925, Eaton filed application for patents on the French Nos. 1 through 11 and 26 through 31. These he had purchased from Thurmond and Sibbald in 1921. The Department instituted contest proceedings.[11] In these proceedings it raised the same assertions that it was later to make in the Wheeler cases. This was, of course, that the locators were not equally interested to the extent of 20 acres per locator; that the claims were located for the use and benefit of Sibbald, and that F. N. Juhan and Elizabeth Juhan were dummy locators. This was notwithstanding that these charges had previously been made and rejected in connection with the patenting of the French Nos. 12 and 25 claims just mentioned.

On March 22, 1929, the Garfield County Exploration Company submitted patent applications covering Bitumen Nos. 25 and 26. On March 22, 1930, the Department initiated contest proceedings but it did not attack the validity of the locations. The contest was for failure to perform annual assessment work. This failure to mention invalidity of locations was despite the fact that Contest Nos. 11596 and 11946 were then pending.

On July 3, 1930, the Commissioner of the General Land Office dismissed the contest against the Bitumen Nos. 25

[10]Plaintiff's Exhibit 5F.

[11]Contest No. 11596, June 23, 1927.

and 26 on the ground that his office lacked jurisdiction to invalidate for failure to perform annual assessment work. But on the same day he entered an order holding the French Nos. 1 through 11 and 26 through 31 null and void because of dummy locators[12] (thus adopting the opposite view from that previously applied to the French Nos. 12 and 25). Patents to Bitumen Nos. 25 and 26 were subsequently issued (on April 3, 1931). No question was raised as to the bona fides of the locators.[13]

After the decision that the French Nos. 1 through 11 and 26 through 31 were null and void, Eaton, in 1932, executed and filed a quit-claim deed to the claims in favor of the Government and received a refund of the money deposited at the time of the patent application. But many years later, in 1950, Eaton re-applied for patents on these same claims and this time was successful. Patents thereon were granted on August 20, 1951.[14]

The Bitumen Nos. 18 and 24 Claims

On June 29, 1928, the Shale Oil Syndicate, Inc. applied for patent on the Bitumen No. 18. The Department commenced adverse proceedings on July 16, 1930, on the ground that the claim was affected by the Thurmond-Sibbald agreement and hence was "fraudulently located for the use and benefit of George B. Sibbald."[15] On January 10, 1933, the Commissioner entered a default judg-

[12]Plaintiff's Exhibit 1G1. The Commissioner's decision was affirmed by the Secretary on June 8, 1939 (Plaintiff's Exhibit J) and re-affirmed on March 22, 1932 (Plaintiff's Exhibit K).

[13]Plaintiff's Exhibit 1C3.

[14]Plaintiff's Exhibit G4.

[15]Plaintiff's Exhibits 1D and 2D.

ment in favor of the Government on the ground that the applicant had failed to appear at the contest hearing, and held the claim to be null and void.[16]

In 1956, the Garfield County Exploration Company purchased Bitumen No. 18 from the Shale Oil Syndicate, Inc., and thereafter, on June 17, 1957, filed a new patent application. Thus, the position of Garfield on this claim was the same as that of the plaintiff on the claims involved in this action. Both parties have sought to obtain patents on claims included in the Thurmond-Sibbald agreement which previously had been declared null and void. Garfield's application for Bitumen No. 18 was successively rejected by the Manager of the Denver Land Office, the Director of the Bureau of Land Management, and the Solicitor, Department of the Interior, the latter stating, in part:

> In addition to the procedural objections, the appellant denies that Bitumen No. 18 was fraudulently located and argues extensively in support of this position. However, since the Commissioner's decision that the claim was null and void became final more than 25 years ago, the merits of the contest will not be reconsidered here. The failure of Shale Oil to take an appeal from the Commissioner's decision declaring the Bitumen No. 18 null and void bars Shale Oil or anyone claiming under it, from a reconsideration of the merits of the case. There is no equitable basis for reopening the contest proceeding now. Between 1933 and 1956, the appellant's predecessor in title took no action with respect to the decision that

[16]Plaintiff's Exhibit 3D. This holding was based upon the same rules of practice relied upon in the 1933 proceedings nullifying the claims which plaintiff now seeks to patent. See Note 8, supra.

> the claim was invalid. The notation in the tract book, the official record showing land status, that the claim was null and void and the case closed in 1933 gave the appellant constructive notice of the fact that the United States claimed ownership of the land. In the circumstances, the appellant was bound to inquire further whether Shale Oil had a possessory interest in the Bitumen No. 18 which it could sell. Where, as here, the default judgment was regularly rendered after notice and opportunity for hearing, where there are no equitable considerations justifying reconsideration, and interests under an oil and gas lease issued by the United States have intervened, the Department will not reopen adverse proceeding in a contest case which was finally closed more than twenty-five years ago (H. W. Rowley, 58 I.D. 550 (1943); Edward Christman et al., 65 I.D. 127 (1955); Gabbs Exploration Company [67 I.D. 160, 165 (1960)].)

Decision of the Solicitor, Department of the Interior, dated August 30, 1960, pp. 5-6.

Garfield applied for patent on the Bitumen No. 24 on March 24, 1929, at the time it made application for the Bitumen Nos. 25 and 26. While the Department was preparing to contest the claim for failure to perform annual assessment work, Garfield expressed its intention to withdraw the application and it was thereafter rejected on September 6, 1929, without contest.[17] Garfield re-applied in 1956. On July 6, 1960, less than two months prior to its rejection of the Bitumen No. 18 application, the Department issued a patent to Garfield on Bitumen No. 24 with-

[17]Plaintiff's Exhibit 1E1.

out challenging the bona fides of the locators.[18] This, plaintiff asserts, was the "culmination of chronic administrative inconsistencies affecting the claims referred to in the Thurmond-Sibbald agreement . . ."

In view of the various actions taken by the Department with respect to the numerous claims, a summary or box score will be helpful to a comprehensive understanding. The Department has patented 22 of the claims covered by the Thurmond-Sibbald agreement. It has rejected patent applications on 39 other such claims.

The French Nos. 12 and 25 were patented in 1923. In 1930, however, the patents were refused on the French Nos. 1 through 11 and 26 through 31. Subsequently, however, in 1951 these were granted.

In 1931 patents for the Bitumen Nos. 25 and 26 were granted. In 1933, however, the Department rejected applications to patent Bitumen No. 18 and all of the claims to which plaintiff now asserts an interest, i.e., the Bitumen Nos. 1 through 8, 11, 14 and 15 together with the Victory Nos. 1 through 5 and 8 through 29.

The Department in 1960 patented Bitumen No. 24, but in the same year refused to patent Bitumen No. 18.

In 1963 the Department rejected applications to patent plaintiff's Bitumen and Victory claims.

The net result is that all of the French claims have been patented and patents have been refused for all of the Victory claims and all of the Bitumen claims with the exception of Nos. 24, 25 and 26.

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[18]Plaintiff's Exhibit 3E.

Plaintiff's Contentions

Plaintiff's argument is that the Department in 1933 issued patents on the French Nos. 12 and 25. This constituted a conclusive affirmation of the Department's recognition of the bona fides of the locators of all claims referred to in the Thurmond-Sibbald agreement and that it had the effect of establishing a rule of property applicable to all such claims, and it thus vested in its predecessors the property right. The further argument of plaintiff is that Wheeler and the other owners of the Thurmond-Sibbald claims were entitled to and did rely on the French Nos. 12 and 25 patent as a conclusive adjudication of the bona fides of the locators, and that the Department's subsequent reversal "effectively deprived Wheeler of its property without due process of law." Plaintiff's more specific arguments are as follows:

(a) That Wheeler's financial inability to appear at the 1933 hearing was "good cause" within the Departmental rule,[19] and the Department erred in entering a default judgment on Wheeler's patent applications;

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[19]The pertinent Departmental regulation applicable to the Wheeler contest provided:

> [Failure] . . . to appear at the hearing ordered *without showing good cause therefor* . . . will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof, and the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office and notify the parties by registered mail of the action taken. In cases finally closed upon default of claimant, if application to reopen any case is filed with the register and receiver, they will forthwith forward same with recommendations to the General Land Office.

Circular 460, paragraph 10, 44 L.D. 572 (1916) (Emphasis supplied.)

(b) That if Wheeler's financial inability was not "good cause," the most the Department could do was to deny the patent application; that it had no authority to declare the *claims* null and void;

(c) That the quitclaim deed executed by Wheeler following the 1933 decision served only to terminate its rights under the patent applications and to permit recovery of the monies deposited therewith; that the deed was not intended as an abandonment of Wheeler's claims and in no way affected its underlying possessory title therein;

(d) That the new patent applications filed by the Wheeler trustees in 1952 and 1953 were the most appropriate and expeditious means to obtain a decision on the validity of the claims;

(e) That under the doctrine of "supervisory authority," the Secretary of the Interior has discretionary authority to reverse a decision of his predecessor; that the Secretary asserted such jurisdiction over the new (1952 and 1953) patent applications and could not thereafter exercise this jurisdiction arbitrarily or capriciously;

(f) That the Department's summary reversal of its 1956 decision to clearlist the Bitumen claims and contest the Victory claims was a denial of due process; and

(g) That the doctrine of laches is not applicable to this case.

The contentions and argument of the Secretary are first, that the proceedings in 1933 declaring the Bitumen and Victory claims null and void were final; that plaintiff's predecessors failed to appeal these rulings and thus

any property that Wheeler had was effectively wiped out as the result of the action of the Department. Accordingly, the surviving trustees of Wheeler had nothing and no property interest to transfer to the plaintiff; that the most that they had to give was a cause of action and therefore, the plaintiff has no standing to even sue.

Second, the Secretary argues inasmuch as the Victory and Bitumen claims were declared null and void in 1933, that the only right that plaintiff and the surviving trustees had was to reconsider the 1933 decision (see *West v. Standard Oil Company,* 278 U.S. 200, 210, 1929). They point out that this proceeding is not followed. Here the surviving trustees filed a new patent application which did not disclose the previous history. Nevertheless, the Secretary considered the arguments and concluded that there was no reason for vacating the 30-year old decisions, noting the ruling in Court of Appeals for the District of Columbia in *Gabbs Exploration Company v. Udall,* 315 F.2d 37, cert. denied 375 U.S. 822.

Third, it is argued that there is no showing that the Secretary acted arbitrarily and proof of this would be necessary in order to justify the granting of relief by this court.

I.

Whether the plaintiffs have standing to sue seems somewhat beside the point. If we conclude, and we do, that the 1933 proceedings were valid and that all rights to the property reverted to the United States, the question of standing to sue fades out. If the surviving trustees had no properties to convey the plaintiff took nothing by his purchase from the surviving trustees. The

trustees had only a right to request reopening and reconsideration. Whether the Department acted arbitrarily in its refusal to exercise supervisory authority ought to be examined on the merits.

Plaintiff's assertion that the Wheeler officers were without funds with which to appear and defend the contest can be taken as undisputed. It does not follow from this, though, that "good cause" existed for Wheeler not to appear. The Law Officer presiding recommended the entry of a default judgment and it was thus determined that the excuse was not "good cause." As we view it, this was a proper exercise of discretion. Certainly a litigant in a court case would not be heard to say that the court was powerless to find that the excuse was not "good cause" and to enter a default. Undoubtedly, many court litigants have suffered default judgments on this account. The applicable Departmental regulation left the question of good cause to the discretion of the law officer hearing the case. The ruling was not an abuse of discretion.[20]

Nor do we agree with plaintiff's argument that assuming Wheeler's financial ability was not good cause that the most the Department could have done was to have denied the patent application. But the regulation provides specifically that failure to appear at the hearing without good cause would be taken "as an admission of the truth of the charges." If the charge of dummy locators is taken as true, the entry of an order nullifying

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[20]We are aware that a Department hearing officer held otherwise in the Mountain Boy case. The fact that the officer found good cause there is not persuasive. It was a discretion judgment.

the claim would logically follow. Furthermore, such "null and void" orders have been entered by the Department in other cases. See, for example, *Gabbs Exploration Company v. Udall,* D. C. Circuit 1963, 315 F.2d 307.

In the case at bar, we have in addition the quitclaim deed given by plaintiff's predecessors, following the denial of the patent application. Certainly this must be taken as an admission by the Wheeler Company that as of that time it no longer wished to contend and to pursue its claims.

It appears incongruous for plaintiff to demand full scale due process at the 1933 hearing in view of Wheeler's failure to appear and its seeming approval of the action taken as evidenced by the quit claim. The Wheeler Company was entitled to have the Department observe its own rule. In our judgment the rule was followed.

II

We regard the applications filed by Wheeler's surviving trustees in 1952 and 1953 as a request to the Secretary to exercise supervisory jurisdiction and apparently the applications were so treated once the knowledge of 1933 proceedings became a matter of record. So viewed, the granting of the request was discretionary. See *Standard Oil v. West,* supra. The Assistant Solicitor noted that the claims here had been declared null and void in 1933 and that the claimants had acquiesced in the decision for many years. He went on to say that under such circumstances the decision nullifying the claims is conclusive and will not be reopened in the absence of a legal or equitable basis warranting reconsideration citing

the Gabbs cases.[21] The decision of the Court of Appeals for the D. C. Circuit in *Gabbs Exploration Company v. Udall,* 315 F.2d 37 was also cited and relied on. That case involved two sets of oil shale placer claims located in 1917 and 1918 in Rio Blanco County and Garfield County, Colorado. Both were contested in proceedings instituted in 1929 on charges of failure to perform annual assessment work and abandonment. The owners of both claims were served with a copy of the contest notice but one failed to file an objection and made no appearance and the other failed to file an answer within the time allowed by the Departmental regulations. Accordingly, in 1930, the Secretary declared both sets of claims null and void and duly notified the contestees. In 1956, plaintiff purchased the claims by quitclaim deed and applied for patents thereon. The District Court granted defendant's motion for summary judgment and the Court of Appeals affirmed. The Appellate Court noted that the Secretary had no authority to declare unpatented mining claims null and void for failure to perform assessment work (citing *Ickes v. Virginia-Colorado Development Corp.,* 295 U.S. 639, 55 S. Ct. 888 (1935)), but that he could do so upon a charge of abandonment. The Court then held that neither plaintiff nor its predecessors had taken timely action to have any wrong in the original proceedings corrected.

> Plaintiff points out that so long as the Department of the Interior retains jurisdiction over the land in question, prior departmental decisions are not strictly *res judicata.* Of course, this is correct, for there have

[21] Citing the Gabbs rulings, *Gabbs Exploration Company,* 67 I.D. 160 (1960); *Gabbs Exploration Company,* A-28213 (May 24, 1960) and A-28213 (Supp.) (July 11, 1960); *Garfield County Exploration Company,* A-28351 (August 30, 1960).)

been cases in which the Secretary of the Interior has reopened prior decisions in order to correct error. E.g., *West v. Standard Oil Co.*, 278 U.S. 200, 49 S.Ct. 138, 73 L.Ed. 265 (1929). Plaintiff argues that, since the Secretary has retained jurisdiction over the disputed land in this case, it follows ineluctably that he must reopen the 1929 decisions and correct any errors there appearing. The premise does not beget the conclusion.

We need not consider whether the power to reopen prior decision is merely discretionary with the Secretary or whether, indeed, the errors urged by plaintiff demonstrate that "manifest injustice has been done or the law clearly misapplied," as is required for reopening. Even if we assume that Gabbs has met these threshhold objections, plaintiff's argument cannot prevail. The Department of the Interior, which has recognized the right of the Secretary to reconsider certain prior decisions, has also recognized that there must be some time limit on such reconsideration. As Assistant Attorney General Van Devanter said in *Aspen Consolidated Mining Co., v. Williams*, 27 L.D. 1, at 11:

> "The parties remain the same and the one complaining of the former decision has taken timely and decisive action to have the alleged wrong corrected."

Here, neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years. Here twenty-seven years have elapsed between the alleged wrong (1929) and plaintiff's attempt to have it corrected (1956).

> There might be some reason to impel the Secretary to reopen a prior decision in order to purge an incorrect determination, but the passage of time might prevent or greatly hinder a proper determination of the initial question, in which case it would be inappropriate for him to reopen the case even though he retains jurisdiction over the land in dispute. This is such a case, for it is now difficult, if not impossible, for the Secretary to determine the facts as to the original abandonment in 1929. Further, nowhere does plaintiff offer any facts showing that its predecessors in interest had *not* abandoned the claims in 1929. This is certainly not a case in which the court should order reopening of the initial contest. Nothing in *West v. Standard Oil Company,* supra, casts the slightest doubt on this conclusion.

Although the early default on the part of the applicant was less questionable in Gabbs than in the case before us, the principle applied in that case is fully applicable here. There they failed to answer. Here they failed to appear at the hearing without good cause but later evidenced approval of the default entered. In each instance the action taken by the Department was a matter of mere error which did not render the proceedings void. Thus, the doctrine of waiver or laches applies. In the case at bar there was an added reason for the Secretary to refuse to reopen and that was the failure of the surviving trustees to disclose the prior proceedings when they reapplied. In this connection we are unimpressed with the testimony of the witnesses Mock and Slusser who were then employed by the Bureau of Land Management that the filing of new applications was an appropriate and expeditious means of obtaining a decision on the validity of the claims.

Nor do we consider meritorious the argument that once the claims had been clearlisted there could be no summary modification. This action was entirely justified once the mistake was discovered, and the Department became aware of the prior proceedings. The patents had not been issued at that point and the Department retained the authority to act.

III

Plaintiff argues at length that the erratic rulings of the Department through the years establishes that it and its predecessors have been treated unjustly. It maintains that the Department holdings that the Sibbald-Thurmond agreement did not render the claims invalid which rulings were made in connection with other claims established a rule of property which precluded the rulings made against the claims in suit. Here again the Department had jurisdiction to correct past rulings which it considered in error. We fail to see that the inconsistency inures to plaintiff's benefit.

• • • • •

For the reasons stated we are of the opinion that the case is wholly lacking in merit. The complaint and the action should be and the same is dismissed. Counsel for the Secretary is directed to prepare a formal judgment finding in favor of the defendant and against the plaintiff, and ordering the dismissal of the action. The Clerk is ordered to withhold the entry of judgment until a formal judgment is signed.

Dated at Denver, Colorado, this 12th day of September, 1967.

By the Court:
William E. Doyle, Judge,
United States District Court.

Appendix D

Filed
United States Court of Appeals
Tenth Circuit
Feb 4 1969
WILLIAM L. WHITTAKER
Clerk

United States Court of Appeals
Tenth Circuit

No. 9852—JANUARY 1969 TERM

Pacific Oil Company, Appellant,

v.

Stewart L. Udall, Secretary of the Interior of the United States, Appellee.

Appeal From The United States District Court
For the District of Colorado
(District Court No. 9406).

Peter H. Holme, Jr., Denver, Colorado (Holme, Roberts & Owen, A. Edgar Benton, and Jeffrey H. Sachs, Denver, Colorado, with him on the Brief), for Appellant.

Clyde O. Martz, Assistant Attorney General (Lawrence M. Henry, United States Attorney, Roger P. Marquis, Thos. L. McKevitt, and Edmund B. Clark, Attorneys, Department of Justice, Washington, D. C., with him on the Brief), for Appellee.

Before Phillips, Hill, and Seth, Circuit Judges.

Seth, Circuit Judge.

The plaintiff brought this action as the owner of a number of unpatented mining claims against the Secretary of the Interior to set aside his adverse rulings on patent applications it had filed for the claims, and to cause patents to issue. The trial court refused plaintiff relief and this appeal was taken.

The issues concern the Secretary's refusal to consider applications for patent filed in 1952 and 1953 for two groups of oil shale placer claims located in 1918. The Secretary rejected the 1952 and 1953 patent applications and terminated other proceedings in reference to the claims on the ground that they had been declared void by a decision of his predecessor in office in 1933.

The basic issue here concerns the effectiveness of this 1933 disposition of a contest entered against the claims, and concerns also the ex parte exercise of the Secretary's discretion in refusing to reopen the matter with the 1952-53 patent applications.

The record shows that the Wheeler Shale Company filed in the Denver District Land Office in 1926 and 1927 applications for patents of placer claims together with applications to purchase, and made a deposit of the purchase price as then required by statute. These filings, and particularly the application to purchase which was a necessary part of patent procedure, constituted an "entry" or "entries" which initiated the departmental action as to these claims. In January 1929 the Register of the Denver Land Office issued his Notice of Contest against the applications and the claims.

In this contest the Register asserted that the claims which were the subject of the entries were not valid. These "charges" as ultimately expressed were: That the claims were located for the use and benefit of a single named person, and that two of the locators whose names appeared on the certificates were dummy locators.[1] The Register also asserted that as to some of the claims an insufficient amount of patent work had been performed and there was a question of discovery.

The Register, by a notice in July 1932, set a hearing on the contest for September 25, 1932, at Glenwood Springs. It was later continued until October 6, 1932. Upon receiving this Notice the patent applicant and now the contestee responded by a "Statement of Contestee" to the Denver Land Office, dated August 4, 1932, which stated:

> "The expense of continuing this contest will be very great because of the number of claims involved [38] and the number and variety of the charges made in the contest notice. This contestee does not have sufficient funds on hand with which to meet the expenses of such a contest; nor can this contestee secure such funds. Contestee has no property which could be used in securing funds except the oil shale claims being contested, and at the present time there

[1]Under the statutes in effect at the time no placer location could include more than 20 acres for each person. Also no single placer claim could be made for more than 160 acres for any association of persons. These provisions were taken by the Land Office to mean that no person could upon location have more than a 20-acre interest in a claim. Thus a location made for the benefit of one in the group whereby such person obtained more than a 20-acre interest in the claim was prohibited. The persons whose names were so used to provide the one person with more than a 20-acre interest were "dummy locators."

is no market for oil shale lands and nothing can be borrowed thereon."

The letter also stated that the contestee had bought the claims some five years after they had been located and it had no connection with the locators and no charge of bad faith had ever been brought against it. The contestee then stated:

"For the reasons herein stated this contestee has not the ability to proceed further with this contest.

"Wherefore, this contestee asks, as to the 38 claims still owned by it, that the Commissioner of the General Land Office shall decide this contest on the record as it stands; and, if such decision is adverse to this contestee, that this contestee be allowed repayment of the purchase price of said 38 claims."

Thereafter, on October 4, 1932, the District Law Officer at Denver filed in the contest proceedings a "Motion For Judgment by Default". (directed to the Commissioner of the General Land Office) which recited the August 4th statement by Wheeler Shale Company, and referred to its request for an "ex parte adjudication of the contest proceedings." The District Law Officer in the Motion stated that the parties do not intend to appear and it thus becomes unnecessary for the Government to put in a "personal appearance" and the "record" could be completed by the formal motion for judgment by default filed with the Special Commissioner before whom the hearing was set. In this same document the Law Officer moved that the failure of the contestees to appear "be taken and considered as an admission of the truth of said charges,

and that judgment by default be entered holding the said applications and each of them, fo cancellation, and the said claims, and each of them null and void, subject, however, to the provision that in the event that favorable consideration be accorded the Petition of the Wheeler Shale Company, the judgment be modified in accordance with the determination upon said Petition."[2]

A few days after filing the above Motion, the District Law Officer wrote a memorandum to the Commissioner of the General Land Office in reference to the contests. He there stated that the Motion for Default was made subject to adverse action upon the contestee's petition for ex parte consideration.

The Commissioner in January 1933 advised the contestees that their financial inability to defend the contest was ". . . no warrant for dismissing the adverse proceedings instituted against the entries and the failure to appear on the date set for the hearing and submit testimony controverting the charges preferred against the entries, is taken as an admission of the truth of the charges and mineral entries . . . are hereby canceled and the Victory Nos. 1 to 29, inclusive, and Bitumen Nos. 1 to 17, inclusive, oil shale placer claims are declared to be null and void." The contestees did not appeal from the Commissioner's decision.

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[2]The regulations effective at this time, 44 L.D. 572 (1916), Cir. 460, stated that if a contestee fails to appear at the hearing (or fails to ask for a hearing and fails to deny the charges or fails to submit a statement of facts) ". . . such failure . . . will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof . . . ." and the Register or Receiver may proceed with the case with recommendation to the General Land Office.

The record shows that after the Commissioner's action, the contestees executed a quitclaim deed "in consideration" of a refund of their purchase money deposit. We attach no significance to the execution of this deed as a conveyance although on first impression it would seem important. At the time it was executed and for many years before, it was customary to use quitclaim deeds for the purpose of terminating "entries." This was considered to be an effective method to clear the Land Office records or to show a positive termination of the entry. Often such a termination was regarded as a prerequisite to the refund of money deposited with the entryman's application when it was not perfected. As to mining claims such a transaction and deed were considered to be effective as to the "entry" only and to have no effect on the mining location. We consider the deed here given to have been for this purpose.

No further proceedings were had until 1952 and 1953 when the surviving trustees of the then dissolved Wheeler Shale Company filed applications for patent for the same claims. The Manager of the Colorado Land Office approved (clearlisted) certain of the claims for patent and initiated contest against others but before any further action could be had, the Manager in April 1959 rejected the applications, cancelled the entries, and closed the abortive contest proceedings. This action was taken on the ground that the Department had learned that these claims had been declared void in 1933 (as above described).

An appeal was then taken to the Director of the Bureau of Land Management who affirmed on September 23, 1960, the Manager's action. An appeal was next taken to the

Secretary who affirmed in May 1963 the Director's decision.

The record shows that no one during the course of any of the proceedings questioned the truth of the contestee's statement that it was not financially possible for it to appear. The issue is the application of the regulations and the procedure to be taken under such circumstances. The regulations provided, as indicated above, that if the contestee did not appear at the hearing without showing good cause therefor, it "will be taken as an admission . . ." etc. Thus the "admission of the truth of the charges" upon nonappearance is operative when the nonappearance is without good cause. Presumably if "good cause" is shown, the Government would proceed with its evidence, —the ". . . necessity for the Government submitting evidence in support thereof [the charges] . . ." would not be obviated. Cases were then heard on this basis. See Mountain Boy, Denver 035039 "N" MAS (June 4, 1934), so strongly urged here by the appellant where a nonappearance by reason of financial inability was excused, the case heard on the "record" (including field reports), and some of the patents applied for were ordered issued and other entries and claims were voided (but with an opportunity for additional showings to be made). As a result financial inability was "good cause" in Mountain Boy but not in the case before us. The appellant complains of this as unequal treatment. On its face it may be, or it may be a result we would not agree with, but this is not for us to decide.

It is clear from the record on this appeal that the Law Officer filed the Motion for Default and recommended to the Commissioner that a default order be entered. The Commissioner had the discretionary power to determine

whether "good cause" had been demonstrated, he had the issue before him in January 1933 when the proceedings were submitted to him, and he expressly advised the contestee that their financial inability to defend was ". . . no warrant for dismissing the adverse proceedings" and the failure to appear ". . . is taken as an admission of the truth of the charges. . . ." This action and recitation by the Commissioner evidences an exercise of his discretion on the matter of "good cause," made the regulation applicable, and when the truth of the contest charges were so "admitted," the cancellation of the entries followed. The fact that the representation of financial inability to appear was perfectly true makes no difference in view of the Commissioner's action. He had the power and discretion to act as he did although the representation was correct.

This in our opinion is the pivotal issue of the case, and contrary to appellant's contention the record shows the exercise of discretion by the Commissioner on "good cause," and not by the Law Officer. He may have followed the Law Officer's recommendation but this does not mean, as appellant in effect argues, that the discretion was not his own. It must then follow that the disposition of the entry was effective and appellant's attack upon it by the subsequent filings and proceedings is unavailing.

The appellant complains bitterly about the different treatment afforded in the Mountain Boy proceedings referred to above. Appellant also points out that the Department has in other proceedings patented claims located under the same division of interest agreement among the locators which was here construed to render the claims invalidly located. The appellants make an appealing argument on what they term the "unequal and conflicting

treatment of the various claims," and the record does demonstrate a series of apparent inconsistent acts with reference to claims in a status similar to those of appellants, and a series of changes in policy with reference to oil shale claims which are somewhat bewildering. This is however a complaint more of the quality and soundness of departmental administration than it is a matter for judicial remedy. The record here shows as above described that the departmental proceedings with reference to these claims were within the statutes and within regulations which are not challenged. The results may have been wrong, the exercise of discretion may have been wrong, and the decisions here concerned may have been inconsistent with those in other cases, but this is not for this court to decide.

It does not appear necessary to treat at length the secondary issue relating to the discretionary power of the Secretary to reopen the old proceedings upon receiving the 1952-53 applications for patent. As stated above the original cancellation was effective some twenty years before, and this was adequate reason to discontinue the second series of applications in an ex parte manner. The Secretary here in effect refused to invoke his supervisory jurisdiction described in West v. Standard Oil Co., 278 U.S. 200, and considered in Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C.Cir.). His subordinates whether or not in ignorance of the old proceedings had considered the 1952-53 applications as new ones, had clearlisted some of the claims, but it was not until the Secretary considered the matter that it was made apparent officially that this was related to the old case on the same claims. The Secretary then refused to reconsider as he might have

done under West v. Standard Oil Co., supra. There is no question but that he has the power not to reconsider, and this he exercised in an effective manner when the matter came before *him* for the first time. The Secretary is the one who has this discretion and not his subordinates.

Affirmed.

JANUARY TERM, FEBRUARY 4th, 1969.

No. 9852

Before Honorable Orie L. Phillips, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges

Pacific Oil Company, a corporation,
Appellant,

vs.

Stewart L. Udall, Secretary of the Interior of the United States of America,
Appellee.

Appeal from the United States District Court for the District of Colorado.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

William L. Whittaker, Clerk,
By Gladys E. Hobbs,
Deputy Clerk.

Appendix E

IX IX S.A.C. IX C. & H.

United States
Department of the Interior
General Land Office
Washington

Jun 4—1934

In Reply Please Refer To

Denver 035039 "N" MAS

Application rejected in part. Additional showing required. Mountain Boy Nos. 2, 3, 4, 5 and 8 placers declared null and void. Charge 8 amended.

Register,

Denver, Colorado.

Sir:

By letter "N" dated May 14, 1927, adverse proceedings were directed against mineral application 035039 of John T. Brierly, trustee (now J. Eddy Richards, trustee), for the Mountain Boy Nos. 1 to 8. inclusive, oil shale placer mining claims situated in Secs. 13 and 14, T. 7 S., R. 97 W., 6th P. M., which as subsequently amended now read as follows:

1. That the locations of the Mountain Boy oil shale placer claims Nos. 1 to 8, inclusive, were not made for the use and benefit of the locators thereof, but were made in the interest and for the benefit of H. A. Quigley and C. H. Conwell.

2. That sufficient discoveries of oil shale were not made on either the Mountain Boy oil shale placer

claims Nos. 1, 2, 3, 4, 5 or 8, prior to February 25, 1920.

3. That neither the locators of the said Mountain Boy oil shale placer claims Nos. 1, 2, 3, 4, 5 and 8, nor their predecessors in interest were diligently engaged in the prosecution of work leading towards a discovery of oil shale on each or any of said claims on February 25, 1920, or thereafter diligently prosecuted such work to a discovery of oil shale on each or any of said claims.

6. That the applicants and their predecessors in interest did not expend on or for the benefit of each or any of the Mountain Boy oil shale placer claims Nos. 1 to 8, inclusive, the sum of $100 in labor and improvements tending to develop or to determine the oil shale character of each of said claims in each of the assessment years ending July 1, 1921, July 1, 1922, July 1, 1923 and July 1, 1924.

7. That the applicants and their predecessors in interest did not expend on or for the benefit of each of the Mountain Boy oil shale placer claims Nos. 1 to 8, inclusive, the sum of $500 in labor and improvements tending to develop or to determine the oil shale character of said claims.

8. That at the time of the alleged location of the Mountain Boy claims, the NE ¼, W ½ NW ¼, NW ¼ NW ¼, NE ¼ SE ¼ Sec. 14, T. 7 S., R. 97 W., 6th P. M., as resurveyed, were claimed, possessed, and occupied in good faith by Walter H. Pritchard under the homestead laws and except as to certain minerals such claim and possession has not been abandoned or relinquished to the United States.

By letter of May 12, 1931, claimants' resident attorneys transmitted an affidavit by the trustee wherein he states

that the parties in interest are the beneficiaries of a Massachusetts trust organized in 1920; that they are citizens of Massachusetts and Rhode Island and purchased the claims for a valuable consideration and without knowledge of any defects in the title, or of any fraud, or attempted fraud in the location of the claims and that while an answer denying the charges has been filed, the claimants have not the necessary funds to pay the expenses of a hearing and are without knowledge of any evidence they can submit in defence of their right to the claims. He asks that the hearing be not held but that the case be determined on the facts shown by the record, which counsel for the defense, in his brief and argument, states means, "not only the files available to our inspection but also the confidential files, affidavits and reports to which we have not access."

In view of the situation thus made to appear by the trustee, it is believed that a hearing may be dispensed with without declaring a default judgment against the defendants, and that a determination of the charges may be made on the present record including the confidential field reports.

According to the mineral application record, the claims were located during 1919 by H. A. Quigley, using his own name, the names of his mother and sister, David Baker and wife, and three persons whose names Quigley states were furnished to him by C. H. Conwell. Statements obtained by the field examiner from the locators indicate that the Bakers were apparently in good faith and that they furnished supplies and the use of their nearby place in connection with the location of the claims.

Quigley's sister stated that he had authority to locate the claims for her and for their mother. The locators whose names were furnished by Conwell stated that they had given consent to the use of their names. All the locators state that they received some money when the claims were sold. No work was done on the claims while held by the original locators except the location work, but the Bakers apparently contributed to this, the mother and sister of Quigley were apparently acting through him, and the three locators furnished by Conwell appear to have been represented by Quigley and to have received payments for their interests. Considering all the available evidence, it is found to be insufficient to establish that any of the locators were without interest in the locations. Charge one is accordingly dismissed.

As to Charges 2 and 3, the report shows that a discovery was made on the Mountain Boy No. 1 claim, but that the surface of the Mountain Boy Nos. 2, 3, 4, 5 and 8 claims does not contain any oil shale outcrops, and none of the work done on said claims has attained a depth sufficient to reach the underlying Green River formation. It is, therefore, evident that there has been no actual discovery of oil shale upon the Mountain Boy Nos. 2, 3, 4, 5 and 8 claims.

Charge 6 does not allege that assessment work had not been resumed after default and prior to the charge, and, therefore, under the decision in the Krushnio Case (280 U. S. 306), said charge is without legal force, and is dismissed.

As to Charge No. 7, the field report shows improvements upon the Mountain Boy No. 1 of the value of $350,

upon Mountain Boy No. 6 of $530, and upon Mountain Boy No. 7 of $763. In addition, these claims are entitled to participate in the value of trail work, sufficient to make up the shortage in patent expenditures. Charge 7 is, therefore, held to be not established as to Mountain Boy Nos. 1, 6 and 7 claims.

Charge 8, which relates to conflict with the Pritchard homestead entry, was preferred under direction of the Secretary of the Interior, in view of which counsel for the contestee has requested that it be left open with the understanding that they may submit to the Secretary a petition for reconsideration of that charge. Inasmuch as this office now takes direct action on oil shale cases there is no occasion for submitting a petition to the Secretary. Any additional showing which counsel desires to present on behalf of contestee should be submitted to this office. Meanwhile, further action on Charge 8 will be held in abeyance. In this connection attention is directed to an erroneous description of the lands claimed by Pritchard as set forth in Charge 8. The correct description is NE ¼, N ½ NW ¼, SE ¼ NW ¼, NE ¼ SE ¼ Sec. 14, T. 7 S., R. 97 W., 6th P. M. Charge 8 is accordingly modified to that extent.

Accordingly the entry is hereby held for cancellation to the extent of the Mountain Boy Nos. 2, 3, 4, 5 and 8 claims, and said claims are adjudged to be null and void subject to right of appeal within 30 days from notice. Should this action become final it will render the Mountain Boy No. 1 claim noncontiguous to the other two claims retained in the application, and the applicants will be required to elect whether the application shall stand

for the Mountain Boy No. 1 or for the Mountain Boy Nos. 6 and 7 claims. However, action in this matter may be deferred pending final disposition of Charge 8. The applicants must also furnish sufficient evidence to cure the following defects at or prior to filing an election as to the claims to be retained in the application:

1. The affidavit of continuous posting, having been executed by one Karl D. Rosenberg, who is not shown to have acted under power of attorney, is not acceptable. In order to cure this defect there should be furnished an affidavit of continuous posting executed by applicants' attorney-in-fact, or by his duly authorized agent if the right of substitution be provided for under his power of attorney, or, if preferred, the act of Rosenberg may be cured by furnishing evidence showing that his act has been ratified and confirmed by said applicants.

2. Supplemental abstract of title brought down to and including July 24, 1924, the date of filing application for patent, the abstract filed with the record being dated July 14, 1924.

You will also call applicants' attention to the closing paragraph of departmental decision of December 19, 1927, which states:

> It is observed that the application for patent is based upon title under the 1919 locations of the Mountain Boy claims, yet the mining claimant in his protest relies solely upon the 1918 locations to defeat Pritchard's claim. Consequently, in the event of a determination based upon the evidence to be adduced at the hearing that the mineral claimant has the better right to all or part of the land described in the foregoing charge by virtue of rights arising solely under the 1918 locations, then full title as a prerequi-

site to mineral patent must be shown in such of the 1918 locations as cover land in which Pritchard is adjudged to have no right or title.

A press copy of this letter is enclosed for transmittal to claimants whom you will notify that 30 days from notice are allowed within which to present a petition for reconsideration of Charge 8, in default of which and in the absence of an appeal, hearing on that charge will proceed without further delay, or if applicants so desire the issue will be determined upon the same basis as that of the other charges.

Very respectfully,

/s/ Wm. W. Johnson

Commissioner